In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 827

THE FLORIDICE CO., INC., ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The Secretary of Labor brought this action against petitioners under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin violations of the minimum wage, overtime, record keeping and shipping provisions of the Act, and to restrain the continued withholding of payment of overtime compensation due certain of their employees. Petitioners denied they were subject to the Act, contending they were a "retail or service establishment" entitled to exemption under Section 13(a) (2) and (4).

Petitioners are engaged in the manufacture and sale of ice. The evidence at trial established that 10% of this ice is sold to the general public in the form of platform sales; 15% is sold to other ice companies or peddlers; 5% is sold to shrimp houses; 22% is sold to shrimp boats and 48% is sold to breweries for icing railroad cars carrying shipments of beer (Pet. App. A-2). The evidence also established that platform sales are made at prices higher than all other sales, that the sales to the shrimp boats were made at prices comparable to the price charged peddlers and that the price to the breweries was lower than that charged peddlers (R. 15-16; Pet. App. A-6).

The court below ruled that these facts established that petitioners business did not qualify for the "retail * * * establishment" exemption from the Act. In so ruling the court refused to give controlling weight to the testimony of members of the ice industry that in the industry all sales not for resale are considered retail sales. Rather, the court relied on the guidelines established by the Department of Labor for determining what sales in the ice industry are to be recognized as retail sales. These guidelines, which have been published in 29 C.F.R. § 779.357, provide that all sales in the ice industry are to be considered as retail sales except:

(a) Sales for resale.
(b) Sales of ice for icing railroad cars and for icing cargo trucks. * * *
(c) Sales of ice in railroad car lots.

(d) Sales of ice of a ton or more.
(e) Sales of ice at a price comparable to that charged by the establishment to dealers * * *.

There can be no question that under the Secretary's guidelines petitioners operation did not qualify for the "retail * * * establishment" exemption. It is equally clear that the decision of the court below is in full accord with this Court's opinion in *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER, 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 285687 502